No. 11,117

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CLIFFORD J. JUDD, *Appellant,*
vs.
UNITED STATES OF AMERICA, *Appellee.*

BRIEF FOR APPELLEE.

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BRIEF FOR APPELLEE.

The appellant, Clifford J. Judd, and one Frank Edwin Sheley, were tried before a jury upon an information charging a violation of Section 241 of Title 18 U.S.C.A., Criminal Code, Section 135, "Attempting to influence witness, juror, or officer". Frank Edwin Sheley was found "not guilty". The appellant was found guilty and was sentenced to imprisonment for a period of six months and to pay a fine in the sum of $500.00.

This is an appeal from the judgment and order so made by the United States District Court for the Southern Division of the Northern District of California.

JURISDICTIONAL STATEMENT.

Jurisdiction is conferred upon the trial Court by Title 28 U.S.C.A., Section 41(2), and upon this Court by Title 28 U.S.C.A., Section 225.

APPELLANT'S ASSIGNMENT OF ERRORS.

I.

That the Court erred in admitting in evidence over the defendant's objection the certified copy of indictment and the record of the cause in action No. 11,171, *United States of America, plaintiff v. Clifford J. Judd, et al.,* pending in the United States District Court for the District of Nevada.

II.

That the Court erred in admitting in evidence over the objection of said defendant the testimony of the witness Dale Haliman concerning a conversation, taking place on April 4, 1945, in the Streets of Paris Cafe in the City and County of San Francisco.

III.

That the Court erred in admitting in evidence testimony as to conversations taking place in Reno, Nevada, on or about the 27th day of March, 1945.

IV.

That the Court erred in refusing to strike from the record all of the testimony of the witness Mrs. Bonita Yaggie.

V.

That the Court erred in overruling the objection of the defendant to testimony of the witness Mrs. Marie V. Cole as to testimony concerning threats made to said witness.

STATEMENT OF FACTS.

The facts are substantially those set forth in Opening Brief for Appellant, pp. 3-33, inclusive. To amplify that record, we set forth here the indictment charging the appellant and one William Nelson Beatty, Jr., with a violation of Section 88 of Title 18 U.S.C.A., which indictment is mentioned in the information in the case now on appeal before this Court (Tr. p. 15):

"In the District Court of the United States of America, in and for the District of Nevada."

UNITED STATES OF AMERICA,
Plaintiff,

vs.

WILLIAM NELSON BEATTY, JR., and CLIFFORD J. JUDD,

INDICTMENT FOR VIOLATION
Sec. 88, T. 18, U.S.C.

United States of America,
District of Nevada—ss.

"Of the February, 1945, Term of the District Court of the United States of America, in and for the District of Nevada;

"The grand Jurors of the United States of America, duly chosen, selected and sworn, within and for the District of Nevada, in the name and by the authority of the United States of America, upon their oaths do find and present:

"That William Nelson Beatty, Jr., and Clifford J. Judd, defendants named above, whose other or true names are to these Grand Jurors unknown, on or about March 15, 1945, and during all the times hereinafter mentioned, at Reno, Washoe County, State and District of Nevada, and within the jurisdiction of this Court, did unlawfully, wilfully, knowingly and feloniously, combine, conspire, confederate and agree together and with each other, to commit offenses against the United States by means and in the manner following, that is to say:

"That at all times herein mentioned, defendant Clifford J. Judd, should keep and maintain at the Depot Bar on Commercial Row in Reno, Nevada, a quantity and supply of intoxicating liquors, to-wit: whiskey; that said Clifford J. Judd should, from time to time, sell, or consign, and deliver quantities of such intoxicating liquor to defendant, William Nelson Beatty, Jr., for transportation from Reno, Nevada, to Salt Lake City, Utah, with the intention in each of said defendants, then and there, that said liquor should be sold and used in the State of Utah in violation of the laws of the State of Utah; that defendant, William Nelson Beatty, Jr., should receive delivery of said liquor from Clifford J. Judd, and should transport it from Reno, Nevada, to Salt Lake City, Utah, for sale and use in the State of Utah, in violation of the laws of said

State; that the liquor so sold or consigned and delivered by Clifford J. Judd to William Nelson Beatty, Jr., and received by the latter, should be sold and disposed of by William Nelson Beatty, Jr., to a person or persons to these Grand Jurors unknown, at prices in excess of the ceiling prices fixed and established for such liquor under and pursuant to Emergency Price Control Act of 1942, as amended, and the Rules and Regulations promulgated pursuant thereto.

"And the Grand Jurors aforesaid, do further present and charge that said defendants having formed the conspiracy, confederation and agreement to execute and do the unlawful acts and things hereinabove set forth, and in pursuance of such unlawful and felonious conspiracy, confederation and agreement, and to effect the objects and purposes thereof, said defendants did commit and perform, among others, the following overt acts:

"(1) On or about March 15, 1945, said defendants, Clifford J. Judd and William Nelson Beatty, Jr., conferred together regarding the objects and purposes and execution of such conspiracy, at the Depot Bar in Reno, Nevada.

"(2) On or about March 16, 1945, defendant, William Nelson Beatty, Jr., purchased from the Matthews Motor Company, in Reno, Nevada, a 1940 Oldsmobile Sedan, for use in the transportation of the liquor.

"(3) On or about March 18, 1945, Clifford J. Judd and William Nelson Beatty, Jr., removed fourteen (14) cases of pints and four (4) cases of fifths, of Old Token Blended Whiskey, 86

proof, from the basement of the Depot Bar in Reno, Nevada, and loaded said whiskey into the said Oldsmobile Sedan automobile.

"(4) On or about March 18, 1945, William Nelson Beatty, Jr., drove said Oldsmobile Sedan automobile, containing said eighteen (18) cases of Old Token Whiskey, from Reno, Nevada, to Elko, Nevada, enroute to Salt Lake City, Utah.

"(5) On or about March 19, 1945, at Reno, Nevada, defendant, William Nelson Beatty, Jr., sent a telegraphic message by Western Union to defendant, Clifford J. Judd, as follows: 'Blown head gasket at Stockmen's Hotel leave tomorrow p.m.'

"Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

/s/ MILES N. PIKE
United States Attorney

"A True Bill:
/s/ HARRY GRAY,
Foreman."

The case in which this indictment was returned shall herein be called the "Nevada case".

ARGUMENT.

I.

THE INFORMATION STATES SUFFICIENT FACTS TO CHARGE APPELLANT WITH A CRIME AGAINST THE UNITED STATES: NO ALLEGATION THAT THE CASE REFERRED TO THEREIN (THE NEVADA CASE) WAS WITHIN THE JURISDICTION OF THE UNITED STATES DISTRICT COURT OF NEVADA WAS REQUIRED.

In his Opening Brief (p. 36) appellant argues:

> "There is no allegation in the information to show that the United States District Court for the District of Nevada had jurisdiction of the case of United States v. Judd and Beatty mentioned in the information. If the Court lacked jurisdiction, no crime could be committed under this statute."

However, no assertion that the Nevada Court had jurisdiction over the Nevada case was required. This very point was raised and disposed of in a case arising under the same statute, Section 241, 18 U.S.C.A., Criminal Code Section 135, *Nye v. United States* (C. C.A. 4), 137 F. (2d) 73, cert. den. 64 S. Ct. 62, 320 U.S. 755. There the Court stated at page 76:

> "The points that the indictment is insufficient in not charging that the court had jurisdiction of the case in which the attempt was made to obstruct justice, and in not charging that the letters and affidavits used were false to the knowledge of defendant, are so manifestly lacking in merit as not to warrant discussion. This was a prosecution for obstructing justice, not a jurisdictional inquiry nor a prosecution for false pretense. That there was no need to allege specifically the jurisdiction of the court over the pro-

ceedings in which it was sought to obstruct justice, see Davey v. United States, 7 Cir., 208 F. 237."

In the case of *Davey v. United States,* 208 F. 237, the Court at page 240 considers the matter of alleging the jurisdiction of the case interfered with in the following language:

> "That point is made that the indictments are insufficient in not showing that the court had jurisdiction over the cause in which McMillen was to be a witness, and that McMillen was not legally designated as a witness. In counts 5 and 6 it is stated that McMillen was a witness 'in a case then and there pending in the District Court of the United States for the District of Indiana, which said cause was then and there entitled "The United States v. Richard E. Walker, No. 7,085, at the May term of said court," ' and that he 'was then and there a material and important witness for the United States in the case aforesaid.' This we deem sufficient."

The reason for this rule is well stated in the *Nye* case, supra, at page 77:

> "Whether the suit was or was not one of which the Court had jurisdiction, there was certainly power in the court to determine the question of jurisdiction * * *. The interests of justice require that questions of jurisdiction as well as other questions be determined in an orderly way; and one who corruptly obstructs or impedes the processes of justice may not escape the consequences of his conduct by showing that the court should have declined jurisdiction of the action with which he corruptly interfered."

II.

THE INFORMATION IS SUFFICIENT TO SUPPORT A CONVICTION: AN INFORMATION NEED NOT BE VERIFIED.

The appellant in his Opening Brief (p. 40) advances the following argument regarding the sufficiency of the information:

> "For still another reason apparent upon the face of the record, the information in the instant case is void. It is verified by the oath of one W. G. Whitfield, who states that he is an investigator of the Alcohol Tax Unit of the Bureau of Internal Revenue, 'that he has read the foregoing information, and that the facts therein stated are true of his own knowledge'. (Tr. p. 3.) The evidence produced at the trial shows that by no possibility could Whitfield have had any personal knowledge respecting the guilt or innocence of either of the defendants or of any other fact alleged in the information. No pretense is made that he was present at the time of the making of any of the alleged threats."

The rule is well settled that to be valid an information need not be verified. The question of Whitfield's knowledge of the facts at the time of his verification is thus remote beyond all calculation.

Husar v. United States (C.C.A. 9), 26 F. (2d) 847; cert. den. 49 S. Ct. 27, 278 U.S. 625;

Merrill v. United States (C.C.A. 9), 6 F. (2d) 120;

Jordan v. United States (C.C.A. 9), 299 F. 298.

The record is void of any showing that a warrant was issued on the basis of the information. *Brown v. United States,* 257 F. 203, cert. den. 40 S. Ct. 119, 251

U.S. 554. Nor was any objection made at any stage of the proceedings prior to this to the validity of the verification. *Jordan v. United States* (C.C.A. 9), 299 F. 298.

The verification by its wording contains no hint that it is limited to "information and belief". In view of the decisive doctrine of the cases herein cited, the appellee considers it superfluous to argue further in support of the verification in the matter before the Court.

III.

THE CONVERSATIONS OF THE APPELLANT PRIOR TO THE ATTEMPT TO INTIMIDATE WERE ADMISSIBLE TO SHOW HIS KNOWLEDGE OF THE PENDENCY OF THE NEVADA CASE AND HALIMAN'S ROLE AS A WITNESS.

The appellant at page 42 of his Opening Brief challenges the admissibility of conversations engaged in by the appellant:

> "The Court erred in admitting in evidence over the objection of said defendant the testimony of the witness Dale Haliman concerning a conversation, taking place on April 4, 1945, in the Streets of Paris Cafe in the City and County of San Francisco (Assignment No. II).
>
> "The Court erred in admitting in evidence testimony as to conversations taking place in Reno, Nevada, on or about the 27th day of March, 1945 (Assignment No. III).
>
> "The Court erred in refusing to strike from the record all of the testimony of the witness Mrs. Bonita Yaggie (Assignment No. IV).

"The Court erred in overruling the objection of the defendant to testimony of the witness Mrs. Marie V. Cole as to testimony concerning threats made to said witness (Assignment No. V).

"These assignments are considered together, because a like error was committed in each instance to-wit: The admission in evidence of an alleged offense other than the one charged in the information."

The general rule excluding evidence tending to show that the accused committed other offenses is subject to a number of exceptions. The only offense referred to in the record of this case, aside from the one stated in the information, was the Nevada case. The appellant's knowledge of the pendency of that case, and his knowledge that Haliman, the victim of his assault, was to be a witness in that case, were necessary elements of proof. Indeed, proof that a Nevada case was in fact pending was essential. The appellant seems to be arguing that no case under Section 241, Title 18 U.S.C.A., can ever be prosecuted where the pending proceeding charges the intimidator of a crime. For it would always be true that a conviction would be necessarily predicated upon this same "error".

Authorities that proof tending to show another crime may be admitted where the knowledge of the accused regarding a constituent element of the offense in question is so proved are numerous.

Fall v. United States, 49 F. (2d) 506, cert. den. 51 S. Ct. 657, 283 U.S. 867;

Whitaker v. United States, 72 F. (2d) 739;

Austin v. United States (C.C.A. 9), 4 F. (2d) 774;

Buhler v. United States (C.C.A. 9), 33 F. (2d) 32;

Miller v. United States (C.C.A. 9), 47 F. (2d) 120;

Gianotos v. United States (C.C.A. 9), 104 F. (2d) 929.

Evidence tending to establish the guilt of the accused, in this case his knowledge of the Nevada case and Haliman's role therein, is not incompetent because it may show him guilty of another offense.

Miller v. United States (C.C.A. 9), 47 F. (2d) 120;

Johnston v. United States (C.C.A. 9), 22 F. (2d) 1, cert. den. 48 S. Ct. 421, 276 U.S. 637.

CONCLUSION.

It is respectfully submitted that the information is sufficient to sustain the conviction, that the lower Court committed no error, and that the judgment should be affirmed.

Dated, San Francisco, California,
March 27, 1946.

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